Supreme Court, U.S.
FILED
AUG 20 1996
CLERK

(2)

No. 96-211

In The

Supreme Court of the United States

October Term, 1995

DALE TAYLOR,

Petitioner,

vs.

LLOYD MEACHAM and UINTAH COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

ROBERT R. WALLACE,
Counsel of Record
Attorney for Respondents
4 Triad Center, Suite 500
Salt Lake City, Utah 84180
(801) 363-7611

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

ISSUES PRESENTED FOR REVIEW

Whether this Court should reassess the complex, voluminous facts and determine the propriety of the factual analysis made by the Tenth Circuit Court of Appeals, through which analysis Petitioner was denied relief?

Whether this Court should give an advisory opinion on the existence of a federal claim for malicious prosecution, where 1) a decision that such a cause of action exists would merely affirm the Tenth Circuit Court of Appeals' recognition of such a cause, yet leave Petitioner without relief because, as a matter of fact, he was not entitled to relief under such a cause of action, and 2) a decision that no such cause of action exists would eliminate the legal basis of Petitioner's claims, also leaving him without relief?

If there is a federal cause of action for malicious prosecution, whether this Court should issue an advisory opinion clarifying the elements thereof, where all circuit courts agree that one element is lack of probable cause, and where Petitioner's claims were dismissed because factually there was ample probable cause for the actions taken against him?

LIST OF ALL PARTIES

The caption in this Court contains the names of all of the parties.

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF THE OFFICIAL REPORT 1

STATEMENT OF BASIS OF JURISDICTION 1

STATEMENT OF THE CASE (FACTS) 1

MISSTATEMENTS OF FACT 17

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS 18

SUMMARY OF ARGUMENT 18

ARGUMENT 19

POINT I PETITIONER ASKS THIS COURT TO REASSESS IMMENSE FACTUAL DATA, NOT A USUAL FUNCTION OF THIS COURT 19

POINT II A DECISION ON THE ASSERTED LEGAL ISSUE WOULD NOT PROVIDE PETITIONER ANY RELIEF AND WOULD BE AN ADVISORY OPINION 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)..... 19

National Bank of Oregon v. Insurance Agents, 508 U.S. 439, 113 S.Ct. 2173 (1993)..... 21

NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981)..... 19

Preiser v. Newkirk, 422 U.S. 395, 95 S.Ct. 2330 (1975)..... 21

Taylor v. Meacham/Uintah County, 82 F.3d 1556 (10th Cir. 1996)..... 1

Texas v. Mead, 465 U.S. 1041 (1984)..... 19

United States v. Johnston, 268 U.S. 220 (1925)..... 19

Statutes

28 U.S.C. § 1254..... 1

42 U.S.C. § 1983.....18, 21

Rules

Rule 10, Rules of the Supreme Court of the United States 1, 19

Constitutional Provisions

Fourth Amendment, United States Constitution..... 18

Fourteenth Amendment, United States Constitution 18

CITATIONS OF THE OFFICIAL REPORT

Taylor v. Meacham/Uintah County, 82 F.3d 1556 (10th Cir. 1996)

STATEMENT OF BASIS OF JURISDICTION

The Petitioner has 90 days from the date of judgment to petition this Court for certiorari. Judgment was entered May 7, 1996. Jurisdiction is not contested under 28 U.S.C. § 1254 and Rule 10, Rules of the Supreme Court of the United States (1995).

STATEMENT OF THE CASE (FACTS)

Petitioner was arrested pursuant to warrant and charged with an eighteen year old homicide. After having been bound over for trial following a two-day preliminary hearing, DNA results from some untagged, unidentified women's pants, which may or may not have been the victim's, resulted in the prosecutor dismissing the charges. Petitioner sued for malicious prosecution. The district court granted summary judgment. The Tenth Circuit Court of Appeals affirmed.

A. The crime, generally, and the initial probable cause regarding the Petitioner.

1. On or about November 26, 1972, a murder occurred in Uintah County, Utah (hereafter the "County"). Gregory Nickells was shot and killed while sitting in his car with a female companion at a remote

overlook. The female companion, Ranelle Stanger (hereafter sometimes referred to as "the Victim"), was raped and eventually released by the murderer and his companion.

2. After the homicide, Susan Dixon, Petitioner's Stepdaughter (hereafter "the Stepdaughter") talked to Detective Ladd of the Salt Lake County Sheriff's Office, declaring that her stepfather, the Petitioner, had admitted to the murder under circumstances which indicated his involvement. (Supp. App.[1] at 1-150.) See paras. 25-32, below, for details.

3. She was so reliable that a recorded statement was taken from her, before Detective Ladd and Don Sawaya of the Salt Lake County Attorney's Office. (Supp. App. at 1-14.)

4. Susan Dixon was even willing to take a polygraph examination concerning her statements. (Supp. App. at 14.)

5. Her statement was so reliable that it was sent to Arden Stewart, the Uintah County Sheriff, for his use. However, Sheriff Stewart does not recall ever having received the transcribed statement. (Supp. App. at 192.)

6. Sheriff Stewart later opined that that statement must have been accidentally placed in an inactive or completed portion of his investigation file. (Supp. App. at 196.)

7. Sheriff Stewart's investigation became inactive.

---

[1] References to Supp. App. are to the Supplemental Appendix filed with the Tenth Circuit Court of Appeals.

B. Additional investigation by Sheriff Meacham.

8. In 1991, Lloyd Meacham, the Respondent herein (hereafter "the Sheriff"), was Sheriff of the County and began to review the unsolved murder. (Supp. App. at 203.)

9. He came across the transcribed statement of Susan Dixon and found it so reliable that he began doing follow-up on it. (Supp. App. at 212, 462.)

10. He re-interviewed the Stepdaughter (by then Susan Dixon Saxton) twice. (Supp. App. at 15-65, 203-204, 210-217).

11. He re-interviewed the Victim (by then Ranelle Simmons) twice. (Supp. App. at 206-210, 219-254, 255-271.)

12. He did significant other follow-up investigation.

C. Independent actions by the County Attorney and Judges leading to Petitioner's arrest and incarceration.

13. Eventually, Sheriff Meacham went to the Uintah County Attorney with the evidence for screening for prosecution. The County Attorney, in an independent review, found the information so reliable that he felt sufficient probable cause existed and authorized prosecution pursuant to Utah Code Ann. § 17-18-1(1)(b) and (3)(b); § 77-2-1; Rule 5(b) Ut.R.Crim.Proc.

14. An Affidavit of Probable Cause concerning the murder was prepared; it was executed by Sheriff Meacham before the Honorable A. Lynn Payne, State District

Judge, on or about August 11, 1992, who issued an arrest warrant. (Supp. App. at 197-218, 292).

15. On September 10, and 11, 1992, a two-day preliminary hearing was held before a different judge, the Honorable John R. Anderson. Petitioner was represented by counsel, and confronted the witnesses against him. (Supp. App. at 66-150, 151-196, 273-384, 385-415, 416-427, 428-437, 438-460, 461-501.) The witnesses included the Stepdaughter and the Victim. (Supp. App. at 66-150, 273-384.)

16. After the preliminary hearing, the court found the testimony of the Stepdaughter and the Victim sufficient for probable cause and bound the Petitioner over for trial.

D. The Murder, Kidnapping and Rape.

17. The Victim stated that on November 26, 1972, she and a Gregory Nickells had parked at an overlook near Vernal, Utah in the evening. (Supp. App. at 198, 206, 307-308.)

18. A stranger tapped on the car window, indicating that he had had car trouble. (Supp. App. at 198, 206, 310.) The stranger then pulled a gun and shot Greg several times. (Supp. App. at 198, 313.) The Victim describes the shooting in some detail, including seeing fire shoot out of the muzzle of the gun, a fact relating to shooting not generally known unless experienced. (Supp. App. at 207, 502.)

19. The murderer then got into the car, pushing Greg over onto the Victim, and drove away. (Supp. App.

at 198, 314), soon linking up with another car driven by an accomplice. (Supp. App. at 198-199, 207, 279, 324, 326.)

20. Eventually the Victim was raped by the murderer (Supp. App. at 199, 207, 280, 325, 505), and later by the accomplice (Supp. App. at 199, 207, 285, 340, 342, 343, 507).

21. The perpetrators eventually burned Greg's car with his body in it. (Supp. App. at 199, 207.)

22. The perpetrators eventually released the Victim who ran to a rural home, where she broke down emotionally in front of the residents, which added to her credibility. (Supp. App. at 200, 508.)

23. The authorities found the burned car with Greg's body in it, consistent with her story. (Supp. App. at 153, 201.)

24. The Victim was examined at a hospital, and given a polygraph, showing her reliable. (Supp. App. at 240-241.)

E. Probable Cause for Petitioner's Arrest.

The following probable cause known to the Sheriff is just part of the evidence of guilt known at the time. Evidence is often broken into two parts, (a) evidence known prior to arrest, most of which was presented in the affidavit for the search warrant, and (b) corroborating evidence known after arrest.

(1) Petitioner admitted/confessed to committing the murder under circumstances which indicated that he did.

(a) Probable Cause Known Prior to Petitioner's Arrest.

25. The Stepdaughter stated[2] and testified[3] that on November 26, 1972, her stepfather, the Petitioner, came home in Salt Lake City about 10:00 a.m. (Supp. App. at 1, 204.)

26. He was "upset, anxious, pacing, paranoid." (Supp. App. at 1, 2, 68, 144-145, 204.)

27. He smelled like a bonfire, strong smoke smell. (Supp. App. at 1, 204-205, 213.)

28. He left and returned at 7:00 p.m., still "paranoid, anxious." (Supp. App. at 1, 16, 144, 204, 213.) He kept looking outside through the curtains. (Supp. App. at 204-205.) She testified, "I've never seen him like that. I've seen him a lot of ways, but not like that." (Supp. App. at 144-145, 205.)

29. When asked why he was so nervous, he confessed that he had "just killed a guy, shot him and then burned him up in a car." (Supp. App. at 2, 7, 15, 70, 120-121, 143-144, 145.)

---

[2] References to statements or reporting are to statements given other than testimony.

[3] References to testifying are to the preliminary hearing testimony.

30. He stated that he had killed the man over a drug deal which had gone sour, and mentioned the name of the murder victim, Nickells. (Supp. App. at 121, 202, 204.)

31. Later, on the 10:00 p.m. news, the Stepdaughter heard of the homicide in Vernal and the Victim's having been burned in his car, just as the Petitioner had described. (Supp. App. at 5, 15, 22, 119, 205, 211.)

32. He described what had happened "before it was even on the news." (Supp. App. at 15, 119, 205, 211.) Detective Ladd verified that the first news report of the incident was at 10:00 p.m., enhancing the Stepdaughter's reliability.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

33. Timothy Kent Redman was a prisoner housed in the cell with the Petitioner during Petitioner's preliminary hearing. After he talked with the Petitioner, he wrote down notes of the conversations, and gave a statement. (Supp. App. at 510-519.)

34. Petitioner told his cellmate that his:

> [D]aughter-in-law remembers what he said that day after he killed soldier boy. Whatever that means. Okay, um, said his wife is scared, won't say anything against him because she's scared to.

(Supp. App. at 511.) The mention of "soldier boy" added reliability to the cellmate. The murder Victim had

recently been discharged from the service, a fact unknown to the cellmate.

35. The cellmate stated:

> Then he [Petitioner] . . . said something after [the] preliminary [hearing] that he was lucky that the chick that was in the car couldn't remember that he was left handed 'cause somethin about twirling a gun. He was twirlin' a gun and she remembered the wrong hand so he was really lucky.

(Supp. App. at 511.)

36. Redman continued:

> Apparently somethin' happened. He said they drew a picture of the cowboy hat on him and she, he was scared she was goin' to remember him that way with the hat on it. He was nervous about that. I don't know if that makes any sense. It, its somethin' he really rattled on a lot about the cowboy hat. Scared she might, scared because she remembered he was a cowboy . . .

(Supp. App. at 512.)

37. He continued:

> That he felt good that she couldn't remember he was left handed. He said that *she remembered me twirling the gun around* but she thought I was doin' it with this hand while I was driving. He goes it was the other way.

(Supp. App. at 514.)

(2) Petitioner did have drug dealings in the Vernal area and knew the area well.

(a) Probable Cause Known Prior to Petitioner's Arrest.

38. The Petitioner dealt drugs and often went to Uintah County for that purpose. (Supp. App. at 2, 9, 19, 134.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

39. David Reynolds, a close friend of Petitioner during 1972, was aware of Petitioner's large drug dealings in that area. (Supp. App. at 386, 390, 405.)

40. Steven Allred, an alcohol/drug rehabilitation director and counselor, a reformed drug user (Supp. App. at 417), knew the Petitioner in 1972, and his drug dealings in Uintah County. (Supp. App. at 417-418.) Petitioner went there several times a week to sell drugs. (Supp. App. at 2, 7, 9, 19, 67, 100, 389, 417-418, 419, 672, 683-684, 706.)

41. George D. McKinney, a resident of the area, recognized Petitioner's picture from the newspaper, and identified him as being there shortly before the murders.

(3) Petitioner denied knowledge of any contacts with the Duchesne/Vernal area.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

42. After his arrest, Plaintiff denied to the police that he had ever been in the Uintah County area. (Supp. App. at 475, 481, 716.) Later, he indicated that he had been in that area only once eight years before. (Supp. App. at 525-526.)

(4) The murderer bragged of raping a thirteen year old, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

43. The Victim testified and reported that the killer said he had raped a thirteen-year-old girl and bragged about other rapes. (Supp. App. at 208, 227, 334, 372, 502, 508.)

44. The Stepdaughter testified and stated that several times the Petitioner had bragged about raping a thirteen-year-old. (Supp. App. at 4, 71, 126, 128, 208, 213.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

45. Steven Allred and David Reynolds testified and had reported that after the homicide Petitioner bragged about rapes, including one in the Uintah County area. (Supp. App. at 405, 420, 421, 540, 576-577, 671, 675.)

(5) The murderer was enamored with cowboy outlaws, as was Petitioner, both even stating they were descended from outlaws.

(a) Probable Cause Known Prior to Petitioner's Arrest.

46. The Victim testified and had reported that the killer talked a lot about the Old West and being like western outlaws like Jesse James. (Supp. App. at 199-200, 208, 219-220.)

47. The killer even talked of having horses ready for a getaway, as if pretending to be a western outlaw. (Supp. App. at 199, 208-209, 287, 333, 507.)

48. The Victim testified and reported that the killer played with his gun a very lot. (Supp. App. at 504.) He "enjoyed his gun," and was "very busy with it." (Supp. App. at 278.)

49. The Stepdaughter testified and earlier stated that Petitioner had a lot of interest in western outlaws. (Supp. App. at 214.) He even named one of his sons, "John Wesley" after the Old West outlaw John Wesley Harden. (Supp. App. at 73.) "Western outlaws were like his heroes and he would play like he was one." (Supp. App. at 73, 214.) He "fantasized western." (Supp. App. at 80.) He stated he was descended from a western outlaw. (Supp. App. at 214.) He twirled and played with his gun a lot. (Supp. App. at 214-215.)

50. The Stepdaughter testified that Petitioner had a lot of books in his home about Old West outlaws. (Supp. App. at 73.) See para. 54, below, corroborating her statement.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

51. Petitioner's wife confirmed Petitioner's strong interest in Old West outlaws. (Supp. App. at 661.)

52. David Reynolds testified that the Petitioner "admired the old west," and tried to be like John Wesley Harden, after whom he named his child (Supp. App. at 387, 541), and Jesse James and Dillinger (Supp. App. at 387), and had a lot of western books (Supp. App. at 578-579).

53. He twirled his gun (Supp. App. at 403, 541-542), and claimed to be a descendant of Butch Cassidy. *Id.* Petitioner played with guns a lot, twirling them and showing them off. (Supp. App. at 389, 419.)

54. The search of Petitioner's home revealed the following old west books which corroborated the Stepdaughter and Mr. Reynolds:

a. A Dynasty of Western Outlaws

b. The Complete and Authentic Life of Jesse James

c. Who Rides with Wyatt

d. The Dalton Gang

e. They Died with Their Boots On

f. Doc Holiday

g. The Dillinger Days

h. Wild, Woolly & Wicked

i. The Great Train Robbery

j. Rifle for Rent

(6) Petitioner denied any interest in cowboys.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

55. Petitioner denied he ever had interest in western outlaws or cowboys. (Supp. App. at 735.)

(7) The killer talked of his horse named Trigger, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

56. The Victim testified and had stated that the killer talked about horses and indicated that he had a horse named Trigger. (Supp. App. at 199, 209, 282.)

57. The Stepdaughter testified that she believed earlier in his life Petitioner had horses. (Supp. App. at 205, 215.) He had talked of a horse named Trigger, but that may have been a fantasy, she said. (Supp. App. at 27, 80, 199-200, 215.)

(8) The killer wore cowboy boots the same size as those of Petitioner in length of heel and width of sole.

(a) Probable Cause Known Prior to Petitioner's Arrest.

58. The killer wore cowboy boots. (Supp. App. at 217.)

59. The Stepdaughter stated that the Petitioner wore cowboy boots. (Supp. App. at 217.)

60. Reynolds testified Petitioner would "always wear cowboy boots." (Supp. App. at 387, 561-562.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

61. At the crime scene, plaster casts were made of cowboy boot prints where the killer walked. The casts matched boots of the Petitioner almost exactly. (Supp. App. at 482.)

(9) The car used by the murderer had orangeish colored, lace-up work boots like those worn by the Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

62. Inside the car of the perpetrators was a pair of "orangeish color" work boots which lace up the front. (Supp. App. at 200, 296, 324, 507.)

63. The Stepdaughter described Petitioner's work boots as "burnt orange/tan." (Supp. App. at 28, 206.) Allred testified that Petitioner had "reddish tan" work boots which lace up the front. (Supp. App. at 422, 427, 693.) Petitioner's wife also confirmed such boots. (Supp. App. at 635.)

(10) The killer got upset when his accomplice called him a name which could have been a unique nickname of Petitioner.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

64. The Victim testified and had stated that the accomplice called the killer "Robert, . . . or something that sounds like Robert. . . . " She could not hear the exact name. (Supp. App. at 283, 331, 336-337, 370, 509.) The killer became very upset and thereafter the killer and the accomplice began to call each other George I and George II. (Supp. App. at 283, 509.)

65. David Reynolds and the Stepdaughter testified that the Petitioner had a unique nickname, "Redbird," (Supp. App. at 102, 398). Paul Champneys so stated also. (Supp. App. at 776, 780, 807, 809.)

(11) The killer used a revolver with a pearl or light handle, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

66. The killer's revolver which he used had light-colored, or pearl handles. (Supp. App. at 217, 316.)

67. The Stepdaughter stated Petitioner had a pearl handled revolver. (Supp. App. at 217.)

68. The Petitioner had been arrested with a pearl handled revolver. (Supp. App. at 443.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

69. David Reynolds testified that the Petitioner had a pearl handled revolver. (Supp. App. at 388.)

(12) The car used by the killer was light-colored with an American flag and another decal, as was Petitioner's car.

(a) Probable Cause Known Prior to Petitioner's Arrest.

70. The Victim testified and had reported that the car which the killer and the accomplice occupied, which she only saw at night under artificial light, was "light colored." (Supp. App. at 198, 502, 503, 509.) She stated, "light color, maybe a cream or light gold or something." (Supp. App. at 509.) She also stated: "The only thing I

could notice was it was a light-colored car." (Supp. App. at 502.)

71. The Victim testified and had reported that the car had two decals in a back window: an American flag, and another about Jackson Hole. (Supp. App. at 200, 288, 509.)

72. The car had a square trunk. (Supp. App. at 509.) The killer cussed it as a Ford, either its real make or merely an epithet about how it ran. (Supp. App. at 509.)

73. The Stepdaughter testified and had reported that her mother's car, a white Chevrolet, 1963, had two stickers in a back window, one an American flag, but she didn't know what the other was. (Supp. App. at 69, 103, 216.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

74. The Petitioner and his wife had been to Jackson Hole before the homicide, and they did collect window stickers. (Supp. App. at 630, 632.)

MISSTATEMENTS OF FACT

While Petitioner's statement that the victim, Stanger, never identified Petitioner (Pet. at 3) is true, it implies that he was never identified. However, his stepdaughter, to whom he confessed the crime, clearly identified him.

Petitioner declares that the individual defendant falsely stated to the victim that someone in a photo line-up had confessed (Pet. at 3). One of the persons in the line-up, the Petitioner, had confessed to his stepdaughter. See Statement of Case, above, at paras. 25-32. The victim, who had only seen the killer at night, could not identify the Petitioner, but also could not exclude him.

The Petitioner did fit the description of the assailant, contrary to Petitioner's allegation.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

42 U.S.C. § 1983; Fourth Amendment to the Constitution; Fourteenth Amendment to the Constitution.

SUMMARY OF ARGUMENT

Because the lower court recognized a federal cause of action for malicious prosecution, Petitioner's request for this Court to recognize such a cause of action would only result in an advisory opinion. If this Court also recognizes such a cause of action, the Petitioner will not obtain relief because the lower court also found that factually the Petitioner was not entitled to relief under such a cause of action. If this Court does not recognize such a cause of action, the legal basis for Petitioner's claim fails, and he is again without relief through an advisory opinion.

All of the circuit courts agree that the common law elements of the tort of malicious prosecution, including lack of probable cause, are elements of a federal cause of action, although the circuit courts may disagree on additional elements. Because the lower court in this case found ample probable cause, any resolution of the elements by this Court, which would undoubtedly include lack of probable cause, would leave Petitioner with no relief, and this Court's opinion would again be advisory only.

Petitioner's real criticism is with the lower court's analysis of massive, complex facts, which this Court rarely reviews.

ARGUMENT

POINT I

PETITIONER ASKS THIS COURT TO REASSESS IMMENSE FACTUAL DATA, NOT A USUAL FUNCTION OF THIS COURT.

This Court rarely accepts certiorari to reassess a lower court's factual analysis. See, e.g. Rules of the Supreme Court of the United States, Rule 10 (1995); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of certiorari which presented primarily a factual question, "which does not merit Court review."); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (This Court is "a court

of law . . . rather than a court for correction of errors in fact finding . . . ").

Petitioner states that the only issue in his Petition is the simple legal issue concerning the existence of a federal malicious prosecution claim. *See* Petition at p.i: Question Presented. However, Petitioner's real complaint is with the lower court's factual analysis concerning the application of malicious prosecution to him which resulted in a finding that Petitioner was not entitled to relief.

Petitioner spends most of his argument in his Petition excoriating the Court of Appeals for its factual analysis under malicious prosecution. *See, e.g.* Petition at pp. 12-14, 11. Only page 15 of his Petition sets out Petitioner's argument with respect to the only question he declares as being at issue. The following are partial quotes from the Petition herein which illustrate that Petitioner's concern is with the lower court's factual analysis: **"A. Factual Problems,"** (Pet. at 12; bold in the original); "two flaws in its [the lower court's] factual analysis . . . " *Id.*; "This [factual] analysis initially fails because . . . " *Id.*; "The analytical approach [concerning the facts] . . . reenforces the very evil . . . " *Id.*; "The factual analysis . . . fails in the reality . . . " *Id.*; "The analysis . . . whereby it [the lower court] ignored exculpatory information . . . " (Pet. at 13); "The second major problem with the factual analysis . . . demonstrates the analysis was erroneous." *Id.*; " . . . yet another example of how the Tenth Circuit . . . did not contemplate the record before it . . . " (Pet. at 14); "In summary, the factual analysis . . . " *Id.*; "The Tenth Circuit substituted its factual judgment for that of . . . " *Id.*

Factually this case is immense. Petitioner himself admits that "hundreds of pages of documents exist with respect to the investigation" at issue. (Pet. at 3.) This Court rarely engages in reviews of such issues and materials, and no reason exists for it to do so here.

In addition, Petitioner's claimed legal issue (even if the legal issue is viable, which is disputed, see Point II, below), is so factually intertwined and enmeshed that this Court would need to reanalyze the complex facts in order to grant Petitioner relief. See Point II, below.

POINT II

A DECISION ON THE ASSERTED LEGAL ISSUE WOULD NOT PROVIDE PETITIONER ANY RELIEF AND WOULD BE AN ADVISORY OPINION.

This Court does not give advisory opinions. *National Bank of Oregon v. Insurance Agents*, 508 U.S. 439, 446, 113 S.Ct. 2173 (1993), citing *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330 (1975) ("a federal court [lacks] the power to render advisory opinions . . . ").

(THE EXISTENCE OF A MALICIOUS PROSECUTION CLAIM)

In the present case, Petitioner brought a malicious prosecution action under 42 U.S.C. § 1983. Petitioner admits that the Tenth Circuit Court of Appeals found in his favor that such a cause of action exists (Pet. at 6, 11, and 15), and that a majority of the circuit courts also recognized such a cause of action (Pet. at 7). The lower court found, however, that Petitioner was not entitled to

relief factually under malicious prosecution. See Point I, above.

Because the lower court recognized a cause of action for malicious prosecution and yet factually found the cause inapplicable to Petitioner, this Court's affirmance of the lower court's recognition of malicious prosecution would not provide relief to Petitioner. Factually, the cause of action would still not apply to Petitioner, and the opinion would be advisory only. On the other hand, a holding by this Court that there is no such cause of action would also afford Petitioner no relief, because Petitioner relied on such a cause. Again, the opinion would be advisory.

(ELEMENTS OF A MALICIOUS PROSECUTION CLAIM)

Petitioner argues that this Court should resolve the varying way the circuit courts describe the elements of malicious prosecution. However, Petitioner would realize no relief from such a resolution.

The primary difference among the circuit courts regarding the elements of malicious prosecution is whether the elements comprehend 1) only the common law elements of the tort, or 2) those common law elements plus a constitutional violation. (See the Tenth Circuit Court's synopsis of the circuit court cases at Pet. App. at 7-10.) All of the circuit courts require, at least, the common law elements. *Id.* Petitioner admits that the Tenth Circuit Court, "reconciling" prior Tenth Circuit cases, held that a malicious prosecution analysis starts

with "the common law elements of malicious prosecution," but ends with necessary proof of a "constitutional violation." (Pet. at 10; App. at 10.)

Lack of probable cause is one of the common law elements as recognized by all of the circuit courts. Because the lower court found as a matter of factual analysis that ample probable cause existed (Pet. App. at 11-16), under any recitation of elements, which would undoubtedly include lack of probable cause, Petitioner's claim fails. Therefore, any resolution of the elements of malicious prosecution by this Court would afford Petitioner no relief and would again amount only to an advisory opinion.

Petitioner fails to show how the lower court's recitation of the elements resulted in error to him, nor how an allegedly more appropriate recitation of elements, which again would undoubtedly include lack of probable cause, would change the result in his case, considering the immense weight of the facts against him. In short, Petitioner merely seeks an advisory opinion on malicious prosecution and the elements thereof.

(LACK OF IMPORTANCE)

This case is not of great public importance or interest. By holding that a malicious prosecution action exists, and properly holding that lack of probable cause is an element thereof, the lower court has, at most, provided potential federal protection to some persons oppressed by law enforcement. By finding, however, that Petitioner did not factually carry the day, the lower court also

protected law enforcement officers who acted appropriately on weighty probable cause. Petitioner is also not harmed because, factually, he was never entitled to relief under malicious prosecution. This Court's eventual opinion of the lower court's recognition of malicious prosecution and the elements thereof should await a proper case and controversy which may provide the appropriate importance for consideration by this Court.

CONCLUSION

This Petition should be dismissed as frivolous because Petitioner has shown no way in which he was prejudiced by the lower court's recognition of a malicious prosecution claim or the elements thereof, and because his only real complaint is with the lower court's factual analysis of immense probable cause.

RESPECTFULLY SUBMITTED this 20th day of August, 1996.

ROBERT R. WALLACE,
Counsel of Record
Attorney for Respondents
4 Triad Center, Suite 500
Salt Lake City, Utah 84180
(801) 363-7611